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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1905

No. 3

STATE OF MISSOURI, CREDITOR, PETITIONER,

vs.

JOHN T. ROSS, TRUSTEE, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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[fol. a] [Caption omitted]

[fol. 1] Citation in usual form, showing service on John T. Ross and others, omitted in printing.

[fol. 2]

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DIVISION OF THE EASTERN DISTRICT OF MISSOURI

In Bankruptcy. No. 6862

In the Matter of the LAESSIG'S OIL PRODUCTS, INC., a Corporation, Bankrupt

CLAIM FOR PREFERENCE—Filed with Reference March 20, 1933

At Jefferson City, Missouri, on the 13th day of March, 1933, comes Richard R. Nacy of Jefferson City, in the County of Cole and State of Missouri and makes oath and says that he is the duly elected, qualified and acting Treasurer of the State of Missouri and duly authorized as such to make this proof and to collect and receive for and on behalf of the State of Missouri all taxes and interest hereinafter described, and further says that the Laessig's Oil Products, Inc., aforesaid is a corporation of the State of Missouri, against which a petition for adjudication in bankruptcy has been filed, and was at and before the filing of said petition and still is, justly and truly indebted to the State of Missouri in the sum of Eight Thousand Five Hundred and Eighty and Twenty-hundredths Dollars ($8,580.20), and that the consideration for said debt is as follows:

That at the times indicated in the account hereinafter itemized and set out, the said Laessig's Oil Products, Inc., received for sale and distribution and sold within this State motor vehicle fuels on which there was levied by the State of Missouri and due the said State and to this affiant as State Treasurer thereof, a license tax of Two Cents $0.02) [fol. 3] per gallon. And in addition to the amount of motor

vehicle fuel tax as above stated the State is also entitled to recover from the said bankrupt interest on the amount of said tax at the rate of Twelve per cent per annum upon said taxes from the dates said taxes were assessed until date the same are paid; that said taxes were assessed and interest began on the dates same were assessed by the State Inspector of Oils as hereinafter set out.

Said account for taxes and the items thereof and the times when the same were assessed and interest began being as follows, to-wit:

Month and year when sold		Amount tax	Date assessed	Interest to date of adjudication
Aug. 1932	Bal.	$1,239.44	10-4-32	$49.16
Aug. 1932		.....	.....	32.94*
Sept. 1932		2,784.14	11-2-32	83.52
Oct. 1932		1,550.72	12-2-32	31.02
Nov. 1932		1,868.18	1-5-32	16.18
Dec. 1932		924.90	2-1-33	....
Total		$8,366.38	.....	$212.82

Total principal and interest, $8,580.20.

Affiant further states that the whole amount of taxes and interest so due to the State of Missouri from said Company on the 1st day of February, 1933, the date of the adjudication of the bankruptcy of said Laessig's Oil Products, Inc., is Eight Thousand Five Hundred and Eighty and Twenty-hundredths Dollars ($8,580.20), together with interest on the amounts of said taxes ($8,366.38) at the rate of Twelve per cent per annum from the date of adjudication, February 1st, 1933, until date the same are paid.

Affiant further states that no part of said debt has been paid and that there are no set-offs or counterclaims to the same; that the State of Missouri has not nor has any person by its order or to the knowledge and belief of affiant for its use, had or received any manner of security for said debt whatever; that no note has been received for said claim, or any part thereof, nor any judgment rendered

* This item of interest is the interest that accrued on the part of the August tax which was paid before adjudication but not before this item of interest had accrued.

thereon or therefor, and that said State of Missouri is entitled to priority in the payment of said taxes and interest.

Richard R. Nacy, Treasurer of the State of Missouri.

[fol. 4] Subscribed and sworn to before me this 16th day of March, 1933. Marie S. Griffin, Notary Public within and for Cole County, Missouri. My commission as Notary Public will expire August 23, 1934. (Seal.)

ORDER OF REFEREE ALLOWING CLAIM OF STATE OF MISSOURI —June 9, 1933.

From Referee's Minutes—Volume 23, Page 390

June 9, 1933.

Hearing by consent on question of allowance of claim of Richard R. Nacy, Treasurer, State of Missouri, $8580.20, had and by consent of trustee, claim allowed state taxes preferred.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DIVISION OF THE DISTRICT OF MISSOURI

[Title omitted]

PROOF OF DEBT OF CITY OF ST. LOUIS, MISSOURI—Filed With Referee February 28, 1933

At St. Louis, in the State of Missouri, on the 9th day of of February, 1933, came Oliver G. Chapman, of said City and State and says:

1. That he hereinafter designates himself as claimant.

2. That he is the License Collector of the City of St. Louis, a corporation, duly organized, existing and doing business under and by virtue of the laws of the State of Missouri, and hereinafter designated as claimant.

That said claimant is doing business at the place, County and State aforesaid, and that affiant is duly authorized to make this proof, and that said bankrupt was, at and before the time the petition in bankruptcy was filed herein, and still is justly and truly indebted to the said claimant in the

[fol. 5] sum of Three thousand four hundred forty-two and 38/100 Dollars.

That the consideration of said debt is as follows:

Gasoline Tax License for quarter of year ending June 30, 1932, due July 16, 1932, and unpaid to date.

That no part of said debt has been paid, except — that there are no offsets or counter claims to the same except — and that this deponent has not, nor has any person for or on behalf of said claimant, or to this deponent's knowledge or belief, for said claimant's use, had or received any manner of security for said debt whatever, nor has any judgment been rendered therefor, or for any part thereof, nor has any note or other evidence of said debt been received, except as herein stated.

Oliver G. Chapman, License Collector of the City of St. Louis.

Subscribed and sworn to before me this 10th day of February, 1933. Fred L. Heinrichsmeyer, Notary Public. My commission expires October 24th, 1933. (Notarial Seal.)

(Filed With Proof of Debt)

Checks tendered in payment for license must be made payable to Oliver G. Chapman, License Collector.

Office of License Collector

Room 102 City Hall

District No. —.

St. Louis, Feb. 1st, 1933.

Laessig's Oil Products, Inc., 4839 Fyler Av.:

You are respectfully notified to call at this office at once and procure your Gasoline License, When Due July 16, 1932, for Quarter ending June 30, 1932.

Oliver G. Chapman, License Collector.

Amount $3442.38.

Return This Notice.

[fol. 6] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DIVISION OF THE EASTERN DISTRICT OF MISSOURI

[Title omitted]

PROOF OF DEBT OF CITY OF ST. LOUIS, MISSOURI—Filed With Referee February 28, 1933

At St. Louis, in the State of Missouri, on the 9th day of February, 1933, came Oliver G. Chapman, of said City and State and says

1. That he hereinafter designates himself as claimant.

2. That he is the License Collector of the City of St. Louis, a corporation, duly organized, existing and doing business under and by virtue of the laws of the State of Missouri, and hereinafter designated as claimant.

That said claimant is doing business at the place, County and State aforesaid, and that affiant is duly authorized to make this proof, and that said bankrupt was, at and before the time the petition in bankruptcy was filed herein, and still is justly and truly indebted to the said claimant in the sum of Three thousand two hundred and sixty and 27/100 Dollars.

That the consideration of said debt is as follows:

Gasoline Tax License for quarter of year ending Sept. 30, 1932, due on Oct. 16, 1932, and unpaid to date.

That no part of said debt has been paid, except — that there are no offsets or counter claims to the same except — and that this deponent has not, nor has any person for or on behalf of said claimant, or to this deponent's knowledge or belief, for said claimant's use, had or received any manner of security for said debt whatever, nor has any judgment been rendered therefor, or for any part thereof, nor has any note or other evidence of said debt been received, except as herein stated.

Oliver G. Chapman, License Collector of the City of St. Louis.

Subscribed and sworn to before me this 10th day of February, 1933. Fred L. Heinrichsmeyer, Notary Public. My commission expires October 24th, 1933. (Notarial Seal.)

[fol. 7] (Filed With Proof of Debt)

Checks tendered in payment for license must be made payable to Oliver G. Chapman, License Collector.

Office of License Collector

Room 102 City Hall

District No. —.

St. Louis, Feb. 1st, 1933.

Laessig's Oil Products Inc., 4839 Fyler Av.:

You are respectfully notified to call at this office at once and procure your Gasoline License, When Due October 16, 1932, for Quarter ending September 30, 1932.

Oliver G. Chapman, License Collector.

Amount $3260.27.

Return This Notice.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DIVISION OF THE EASTERN DISTRICT OF MISSOURI

[Title omitted]

PROOF OF DEBT OF CITY OF ST. LOUIS, MISSOURI—Filed With Referee February 28, 1933

At St. Louis, in the State of Missouri, on the 9th day of February, 1933, came Oliver G. Chapman, of said City and State and say

1. That he hereinafter designates himself as claimant.

2. That he is the License Collector of the City of St. Louis, a corporation, duly organized, existing and doing business under and by virtue of the laws of the State of Missouri, and hereinafter designated as claimant.

That said claimant is doing business at the place, County and State aforesaid, and that affiant is duly authorized to make this proof, and that said bankrupt was, at and before the time the petition in bankruptcy was filed herein, and still is justly and truly indebted to the said claimant in

[fol. 8] the sum of Two thousand three hundred twenty-three and 65/100 Dollars.

That the consideration of said debt is as follows:

Gasoline Tax License for quarter of Year ending Dec. 31, 1932, due on Jan. 16, 1933, and unpaid to date.

That no part of said debt has been paid, except — that there are no offsets or counter claims to the same except — and that this deponent has not, nor has any person for or on behalf of said claimant, or to this deponent's knowledge or belief, for said claimant's use, had or received any manner of security for said debt whatever, nor has any judgment been rendered therefor, or for any part thereof, nor has any note or other evidence of said debt been received, except as herein stated.

Oliver G. Chapman, License Collector of the City of St. Louis.

Subscribed and sworn to before me this 10th day of February, 1933. Fred L. Heinrichsmeyer, Notary Public. My commission expires October 24th, 1933. (Notarial Seal.)

(Filed With Proof of Debt)

Checks tendered in payment for license must be made payable to Oliver G. Chapman, License Collector.

Office of License Collector,

Room 102 City Hall

District No. —.

St. Louis, Feb. 1st, 1933.

Laessig's Oil Products Inc., 4839 Fyler Av.:

You are respectfully notified to call at this office at once and procure your Gasoline License, When Due January 16, 1933 for Quarter ending December 31, 1932.

Oliver G. Chapman, License Collector.

Amount $2323.65.

Return This Notice.

[fol. 9] ORDER OF REFEREE ALLOWING CLAIMS OF OLIVER G. CHAPMAN, COLLECTOR—June 9, 1933

From Referee's Minutes—Volume 23, Page 390

June 9, 1933.

Hearing by consent on question of allowance of claims of Oliver G. Chapman, Collector, $2323.65, $3260.27 and $3442.38, had and by consent of trustee claims allowed city taxes preferred.

IN UNITED STATES DISTRICT COURT

MOTION TO MODIFY ORDER OF REFEREE RESPECTING TAXES DUE STATE OF MISSOURI—Filed With Referee April 10, 1934

To John A. Hope, Esquire, Referee in Bankruptcy:

Comes now claimant, the State of Missouri, and respectfully represents that:

(1) On or about the 20th day of March, 1933, a claim for preference was filed by this claimant respecting an indebtedness due from the bankrupt herein in the sum of Eight Thousand Five Hundred Eighty Dollars and Twenty Cents ($8,580.20).

(2) That the nature of said demand was a claim for taxes due the State of Missouri upon gasoline sold by the Bankrupt herein; said tax accruing by virtue of the provisions of Article II Chapter 41 R. S. Missouri, 1929.

(3) That on the 9th day of June, 1933, your Honor made an order allowing the claim of the State of Missouri, in the sum of Eighty-Five Hundred and Eighty Dollars and Twenty Cents ($8,580.20), said claim being allowed as a preferred claim against the bankrupt estate for state taxes.

(4) That on the same date, to-wit, the 9th day of June, 1933, your Honor made an order allowing the claims of the City of St. Louis in the sums of Twenty-Three Hundred and Twenty-Three Dollars and Sixty-Five Cents ($2,323.65), Thirty-Two Hundred Sixty Dollars and Twenty-Seven Cents ($3,260.27) and Thirty-Four Hundred and

Forty-Two Dollars and ThitryEight Cents (3,442.38), as preferred claims against said estate for city gasoline taxes.

(5) That by virtue of 11 U. S. C. A. 104, all of these taxes are classed as preferred claims but the priority as between taxes is not established or attempted to be determined.

[fol. 10] (6) That by the provisions of Section 3152 R. S. of Missouri 1929, the taxes due the State of Missouri are entitled to preference over the taxes due the City of St. Louis, such statute not being in conflict with the Federal Bankruptcy Act.

Wherefore, the premises considered, claimant prays that the order herein made be modified allowing claimant's taxes herein referred to as a prior preference and that the trustee be directed to pay claimant's demand in full before disbursing any dividends to the City of St. Louis.

State of Missouri, Roy McKittrick, Attorney General. Harry G. Waltner, Jr., Assistant Attorney General. Joseph A. Lennon, Assistant Attorney General.

IN UNITED STATES DISTRICT COURT

ORDER DENYING MOTION TO MODIFY ORDER RESPECTING TAXES DUE THE STATE OF MISSOURI—Filed with Referee August 31, 1934

At St. Louis, in said Division of said District, this 31st day of August, 1934.

Now again comes the State of Missouri by Honorable Roy McKittrick, Attorney General, Honorable Harry G. Waltner, Jr., Assistant Attorney General and Honorable Joseph A. Lennon, Assistant Attorney General, and also comes the City of St. Louis by its attorneys, Honorable Charles M. Hay and Honorable John G. Burkhardt; and the motion of the State of Missouri filed herein on April 4, 1934, praying that the orders entered herein allowing the respective claims of the State and of the City against the bankrupt estate herein, for gasoline taxes, both dated June 9, 1933, be modified so as to give the said claim of the State priority over that of the City and so as to direct and require the trustee in Bankruptcy herein to pay said

claim of the State in full before paying any dividend on the claim of the City of St. Louis, is submitted to the undersigned Referee in Bankruptcy upon the proofs of said respective claims as heretofore filed herein, the said orders of June 9, 1933, allowing the same, and the other files and proceedings herein, and upon the briefs and arguments of counsel for the State and the City, respectively; and the referee having given the matter due consideration and be-
[fol. 11] ing fully advised in the premises, it is

Ordered that said motion of the State of Missouri be and hereby is overruled and denied, and that the same be and hereby is dismissed.

John A. Hope, Referee in Bankruptcy.

IN UNITED STATES DISTRICT COURT

PETITION FOR REVIEW OF REFEREE'S DECISION RESPECTING GASOLINE TAXES DUE THE STATE OF MISSOURI—Filed With Referee September 11, 1934

To Honorable John A. Hope, Esquire, Referee in Bankruptcy:

Now on this day comes claimant, the State of Missouri, and respectfully shows:

That your petitioner is a creditor of the above named bankrupt and has heretofore filed its claim against the above estate for gasoline taxes due the State of Missouri under the provisions of Article 2, Chapter 41, Revised Statutes of Missouri, 1929.

That the City of St. Louis is likewise a creditor of the above bankrupt and filed its claim against the above estate for gasoline taxes accruing to such municipality by virtue of the provisions of an Ordinance of said city regularly enacted and adopted.

That heretofore both said claims were allowed as preferred claims of equal priority against said estate.

That within the time required by law claimant herein filed its motion to modify the order of the Referee allowing said claims as preferred claims of equal priority, and prayed that the claim of the State of Missouri be allowed as a prior preference.

That on the 31st day of August, 1934, an order, a copy of which is hereto attached, was rendered and entered overruling and denying the said motion of the State of Missouri, the effect of which was to decree that the State of Missouri should not have priority over the City of St. Louis in respect to the payment of their respective claims for gasoline taxes.

That the order of August 31st, 1934, was and is erroneous in this:

[fol. 12]

I

That it is contrary to the law applicable to this case in that it ignores the principle that the sovereignty is entitled to the payment of its debts prior to the payment of debts of individuals or government agencies of lesser dignity.

II

That it is contrary to the law applicable to this case in that it ignores the provisions of the statutes of the State of Missouri, to-wit, Section 3152 R. S. Mo. 1929, which gives to the State of Missouri priority in case of insolvency for its debts and taxes over others having claims of like nature, which statutory provision is not contrary to or in conflict with the provisions of the Federal Bankruptcy Act.

Wherefore, the Court erred in denying Petitioner's motion to modify the decree and erred in failing to allow Petitioner's claim as a prior preference over the claim of the City of St. Louis in the distribution of the assets of the Bankrupt.

Therefore, your Petitioner feels aggrieved because of such orders and respectfully prays that the same be reviewed.

State of Missouri, Petitioner, Roy. McKittrick, Attorney-General; H. Geo. Waltner, Jr., Assistant Attorney-General; J. A. Lennon, Assistant Attorney-General, for Petitioner.

IN UNITED STATES DISTRICT COURT

CERTIFICATE OF THE REFEREE ON PETITION OF THE STATE OF MISSOURI FOR REVIEW OF THE ORDER OF THE REFEREE DENYING PETITIONER'S MOTION TO DIRECT THE TRUSTEE TO PAY THE STATE'S CLAIM FOR GASOLINE TAXES IN FULL BEFORE MAKING ANY PAYMENT TO THE CITY OF ST. LOUIS—Filed September 21, 1934

I, John A. Hope, One of the Referees in Bankruptcy of this Court, do hereby certify that on the 1st day of February, 1933, Laessig's Oil Products, Inc., a corporation, was adjudicated a bankrupt by this Court, and thereupon [fol. 13] the case was referred generally to Honorable Walter D. Coles, then one of the Referees in Bankruptcy of this Court for administration. Said Coles resigned as such Referee, effective February 1st, 1934, on which date the Court accepted his resignation and appointed me as his successor, and directed that all cases theretofore referred to said Coles as such Referee be referred to me as his successor.

I further certify that in the course of the proceedings in the above entitled cause before me, the following question arose pertinent to the said proceedings:

Motion of the State of Missouri to Modify Order of Referee Respecting Taxes Due the State

On April 10, 1934, the State of Missouri, by its Attorney-General, filed with me a motion asserting that the claim of the State for gasoline taxes in the sum of $8580.20, allowed by the Referee on June 9, 1933, "as a preferred claim for state taxes," should be given priority over certain claims which the Referee had allowed "as preferred claims for (St. Louis) City gasoline taxes." The motion asked that the order allowing the claim of the State be modified so as to give it the priority mentioned, and "that the trustee be directed to pay claimant's demand in full before disbursing any dividends to the City of St. Louis." As ground for the priority thus claimed, the motion avers "that by the provisions of Section 3152, R. S. Mo. 1929, the taxes due the State of Missouri are entitled to preference over the taxes due the City of St. Louis, such statute not being in conflict with the Federal Bankruptcy Act."

Motion Heard

On August 31, 1934, I heard the above motion and took it as submitted upon—

(a) Three separate proofs of claim for the City taxes, each in the prescribed bankruptcy form, signed and sworn to by Oliver G. Chapman, License Collector of the City of St. Louis, and filed with Referee Coles on February 28, 1933, showing that the bankrupt "was at and before the time the petition in bankruptcy was filed herein, and still is, justly and truly indebted to the said claimant for "gasoline tax license" in the sum of $3442.38 "for quarter year ending June 30, 1932", $3260.27 "for quarter year ending September 30, 1932," and $2323.65 "for quarter year ending December 31, 1932."

(b) The order of Referee Coles dated June 9, 1933, allowing these claims, after due hearing, and by consent of the trustee, for the amounts mentioned as "city taxes preferred."

[fol. 14] (c) Proof of the claim of the State of $8580.20, consisting of $8367.38 as license tax on motor vehicle fuels sold by the bankrupt from August to December, inclusive, 1932, and interest thereon to date of the adjudication in bankruptcy. This proof is in the prescribed bankruptcy form, with the added allegation "that said State of Missouri is entitled to priority in the payment of said taxes and interest." It is signed and sworn to by the State Treasurer, Richard R. Nacy.

(d) The order of Referee Coles, dated June 9, 1933, allowing the above claim as "state taxes preferred."

(e) Other files and proceedings in the case disclose that the assets of the bankrupt estate have been liquidated and converted into money; that the trustee has paid certain approved and allowed costs and expenses of administration, and preferred wage claims, and has a balance in his hands of $11,867.18; that in addition to the above allowed tax claim of the State, $8580.20, and the allowed tax claims of the City of St. Louis $9026.30 tax claim of the City of Maplewood for $3.98, and tax claim of the City of University City for $44.93, have been allowed; so that the total of the allowed claims for taxes is $17,655.41, being $5798.23

in excess of the total amount of the bankrupt estate left for distribution. Some costs of administration are still to be paid out of the above balance.

Motion Denied. Petition for Review

After due consideration of said motion and of the pertinent facts, as disclosed by the files and record above mentioned, I made and entered an order on August 31, 1934, denying a motion and dismissing it. On the next day, September 1, 1934, the State filed its petition for a review of this order by the Judge, upon the following grounds:

I

That it is contrary to the law applicable to this case in that it ignores the principle that the sovereignty is entitled to the payment of its debts prior to the payment of debts of individuals or government agencies of lesser dignity.

II

That it is contrary to the law applicable to this case in that it ignores the provisions of the statutes of the State of Missouri, to-wit, Section 3152 R. S. Mo. 1929, which gives to the State of Missouri priority in case of insolvency for its debts and taxes over others having claims of like nature, [fol. 15] which statutory provision is not contrary to or in conflict with the provisions of the Federal Bankruptcy Act."

Opinion of the Referee

Since the order is to be reviewed, it may not be improper, I think, for me to explain that I made the order upon the authority of Section 64 of the Bankruptcy Act and the decisions of the Federal Courts interpreting its provisions, as I understand them.

C City of Dallas vs. Sophie Ryan, et al., 22 A. B. R. (N. S.) 378;
Re A. J. Waterman Mfg. Co., 291 Fed. 589, l. c. 594;
Re Wyley Company, 292 Fed. 900 l. c. 902;
Re A. E. Fountain, Inc., 295 Fed. 873;
Guaranty Title & Trust Co. vs. Title Guaranty & Surety Company, 224 U. S. 152, 56 L. Ed. 706;
Re Rouse, Hazard & Company, 91 Fed. 96;
Re Slomka, 122 Fed. 630;
Re Consumers Coffee Co., 18 A. B. R. 500 l. c. 502.

Section 64, says the Circuit Court of Appeals, Fifth Circuit, in Dallas vs. Ryan, supra, "gives the rule for paying out the money arising from the bankrupt's property which remains for general distribution after all special liens and encumbrances have been dealt with." Valid liens on the bankrupt's property are to be first satisfied (Sec. 67d); next the priority claims mentioned in Section 64 are to be paid; and then any balance remaining is to be distributed as dividends to general creditors. Section 64 as amended by the Act of May 27, 1926, divides the priority items into seven classes, numbers them 1 to 7, and requires payment in the order in which they are thus numbered. "*All taxes* legally due and owing by the bankrupt to the *United States, State, County, District,* or *Municipality*" are put in class 6. See Sec. 64a and 64b (6). "Debts owing to any person (the United States and the several States being included in the term person as here used) who by the laws of the States or the United States are entitled to priority," are 7th and last in the order of payment.

The State of Missouri relies on Section 3152, Revised Statutes of Missouri, 1929, which provides that "whenever any person indebted to the State of Missouri is insolvent • • • the debts due the State of Missouri shall be first [fol. 16] satisfied, and the priority hereby established shall extend as well • • • to cases in which an act of bankruptcy is committed • • •." The learned Attorney-General and his assistants say that by reason of this section, 3152, and clause 7 of Section 64-b of the Bankruptcy Act, quoted above, the State's gasoline tax bill in this case should be paid in full prior to any payment on the allowed tax claims of the City of St. Louis.

It is doubtless true that the tax bill in question is a debt within the meaning of that term as used in Section 3152 of the Missouri Statutes (State ex rel vs. Trust Company, 209 Mo. 472, l. c. 491), and in the Bankruptcy Act. Kaw Boiler Works vs. Shull & Sanderson (C. C. A. 8th Cir.) 36 A. B. R. 531. But counsel overlook, it seems to me, that all taxes,—whether "United States, State, County, District, or Municipality",—are, by Section 64-b (6) definitely placed upon the same plane and in the same class, without distinction or priority, but ahead, of course, of the debts mentioned in clause 7 of this section.

In the matter of A. J. Waterman Manufacturing Company, supra, the Court, dealt with Section 64 as it stood

prior to the amendment of 1926, and said, among other things:

"Sub-section (a) of Section 64 of the Bankruptcy Act puts all taxes in one class, and in a class prior to all claims enumerated in section (b). I cannot sustain the contention of the United States that the United States has priority in the matter of taxes over the City of Portland, *and that section is distinct in putting all taxes upon an equality* * * *." 291 Fed. l. c. 594.

In the matter of Wyley, supra, the court, ruled on the question as to the priority of United States taxes over State taxes, and said:

"* * * Considering the dual nature of our government, and that neither the Union nor the States may destroy nor hinder the other in their several functions, and all having equal need of their revenues, it is concluded that the intent of Congress was that *there should be a pro-rata payment upon all the taxes named in Section 64 (a) when the available fund is not sufficient to pay in full*, the taxes due the United States having no priority over the others * * *." 292 Fed. l. c. 902.

In the matter of A. E. Fountain, Inc., supra, the Referee had ordered "that the taxes of the United States and the State of New York should be pro-rated and paid *pari passu.*" Reviewing the order of the Referee, in connection [fol. 17] with Section 64 as it then read (1924), Judge Hand, then District Judge for the Southern District of New York, observed.

"That taxes under the foregoing provisions of the Bankruptcy Act are not directed to be paid in any precise order though the United States is mentioned first. As the Act carefully provides in subd. (b), the order of payment of various items by placing them under separate numerals, it seems reasonable to contend that it would have done this in respect to taxes if Congress had intended any discrimination in priority between taxes due the United States and taxes due the states and political subdivisions thereof." 295 Fed. l. c. 874.

It may here be noted that Congress did, by the amendment of 1926, remove taxes from subdivision (a) down to

the sixth place in the order of priority, that the amendment made no other change in relation to taxes, that in thus assigning taxes to class six, United States taxes, state taxes, and municipal taxes were not placed "under separate numerals", but all alike were put under the one numeral 6. Hence, it is reasonable to conclude, as indicated by Judge Hand in the Fountain case, that Congress intended that there should be "no discrimination in priority" between the different kinds of taxes. "Of course", as the Court remarked in the Fountain case, "any tax which is a lien would necessarily precede any other claim whether by virtue of the taxing power or otherwise which was not a prior lien." But the taxes here in question are not liens on the property of the bankrupt. No provision in the Statute (Article 2, Chapter 41, Revised Statutes of Missouri, 1929) under which the so-called State gasoline taxes were assessed makes them a lien, either general or special, on any property of the taxpayer.

Section 3466 of the Revised Statutes of the United States gives priority to debts owing to the United States in substantially the same words as those used in the Missouri Statute (Section 3152 supra) to give the state priority for the collection of debts due the state. This section, 3466, having been cited in the Fountain case as entitling United States taxes to priority over State taxes, Judge Hand ruled

"Nor does Section 3466 in my opinion apply; that very section was invoked in the case of Guaranty Title & Trust Co. vs. Title Guaranty & Surety Co., 224 U. S. 152, 27 A. B. R. 873, 32 Sup. Ct. 457, 56 L. Ed. 706, and the Supreme Court held that it was superseded by the later Bankruptcy Act. The opinion said, 'The Act takes into consideration, we think the whole range of indebtedness of the Bankrupt, national, state and individual, and assigns the order of payment' " 295 Fed. l. c. 875.

[fol. 18] If, as held in the Waterman and Fountain cases, Section 3466, because superseded by the Bankruptcy Act (Sec. 64), gives United States taxes no priority in bankruptcy over State taxes, it is difficult to understand how Section 3152 of the Missouri Statutes can be said to give State taxes priority over city taxes, in the face of the fact that the Bankruptcy Act (Sec. 64) puts all taxes, City, State and United States alike, in one and the same class.

With reference to clause 7 of Section 64, it may be further said that the word "debt" in this clause, even conceding it to be broad enough to include taxes, must, so far as it attempts to bring state and city taxes down to clause 7, with priority for the state taxes, give way to the specific provision for taxes in clause 6, in accordance with the familiar rule of statutory construction that a specific provision on a particular subject controls over general language on the same subject.

"In other words", as aptly expressed in the matter of Lewis 99 Fed. 936, "although the laws of a State giving priority to certain debts are by Section 64-b cl. 5 (now 64-b cl. 7) introduced into the scheme of the present Bankruptcy Act, yet such State laws are so introduced only so far as the debts to which they give priority are not expressly dealt with as to priority in the Bankruptcy Act itself. Where both a State law and the Bankruptcy Act give priority to the same class of debts, the Bankruptcy Act not only controls the State law in the case of absolute conflict between the two, but by its express regulation of these priorities, excludes the State law altogether." See also Re: Honka, 122 Fed. 630 (C. C. A. N. Y.).

The Attorney-General cites in Re: Wright, 95 Fed. 807, in Re: Falls City Shirt Manufacturing Co., 98 Fed. 592, and Oliver vs. United States, 268 U. S. 1, 69 Law Ed. 817, as supporting his contention. I think he misconceives the meaning of these decisions. Rightly understood they seem to have no application. In the Wright case the bankrupt owed the County of Worcester, Massachusetts, a bill for the priority of the labor of its convicts. Under an insolvency law of that State such a bill was preferred, and the County asked that it be given priority under clause 5 (now cl. 7) of Section 64 of the Bankruptcy Act. Manifestly it did not come within any of the preceding clauses of that section since it was not cost of preserving the estate under clause 1, nor filing fees under clause 2, nor cost of administration under clause 3, nor wages under clause 4 (now cl. 5), nor taxes under paragraph (a). So District Judge Lowell assigned it to clause 5 (now cl. 7), and gave it priority over [fol. 19] general creditors by reason of the fact that this last clause incorporated therein the priority provision of the Massachusetts statute.

The Falls City case involved two claims which were liens on the bankrupt's property under Kentucky law. One was a landlord's lien and the other a material man's lien. Obviously these claims could not be assigned to any of the classes enumerated at 1 to 4 of Section 64, nor were they taxes specifically provided for in paragraph (a). So the United States District Court for the District of Kentucky, acting as a court in bankruptcy, put the claims of these lienholders in the last subdivision of Section 64 (cl. 5, now cl. 7), and accorded them priority to that extent over general creditors, by reason of the Kentucky lien statutes.

Nor is there anything in the decision of the Supreme Court of the United States in Oliver vs. United States, supra, that supports the claim of the State in this case. The question in the Oliver case was whether under Section 64, as it then read (1925), taxes or wages should be paid first. The taxes in the Oliver case were not secured by any lien on the property of the bankrupt. Of course, when there is a valid lien, such as the tax lien on real estate in Missouri, the lien is recognized and preserved in bankruptcy. The opinion in the Oliver case, as I understand it, simply held that taxes, unsecured by any lien, such as the gasoline taxes in the case at hand, were, by reason of paragraph (a) of Section 64, as it then stood, to be paid prior to the wage claims provided for in clause 4 (now cl. 5). Congress then, by the Amendment of May 27, 1926, moved "taxes payable under paragraph (a) hereof", namely, "*all* taxes legally due * * * the United States, state, county, district, or municipality", down to clause 6, just below wages in clause 5, since which time wages of the kind mentioned in clause 5 have been paid in full before taxes.

There is nothing in the Oliver case that justifies in the least, as I understand the decision, the contention that clause 7 (formerly cl. 5) of Section 64 modifies clause 6 so as to require state taxes to be paid ahead of other taxes. On the contrary, the word "dividend" in paragraph (a) of this section, and "as commonly used throughout the Bankruptcy Act, means", says the Supreme Court in the Oliver case, "partial payment to *general* creditors." It necessarily follows, it would seem, that the provision in Section 64-b that "the debts to have priority in advance of the pay-
[fol. 20] ment of *dividends to creditors* * * * shall be * * * (7) debts owing to any person (including the State) who by the laws of the States or the United States

is entitled to priority, means that the debts referred to in this clause 7 are to have priority over *general* creditors and not over any of the preferred claimants mentioned in the preceding clauses 1 to 6, inclusive, of Section 64.

There is some support for this view, I think, in the decision of the Circuit Court of Appeals, Second Circuit, in the matter of Ireland Dredging Corporation, etc., 61 Fed. (2d) 765. In this case, the creditor was an insurer of the bankrupt under the Workmen's Compensation Act of New York, and had a claim against the bankrupt for unpaid insurance premiums. An amendment to the Compensation Act, known as Section 130, gave the insurer priority, "subject to claims for wages". Near the end of the opinion, the Court said:

"We do not of course mean that a State statute may control the distribution of bankrupt estates. The priority arises under Section 64-b (7), which incorporates the state law pro tanto; and the hierarchy of claims—the order of their priority—is fixed by that section. Hence we ignore the provision of Section 130 that premiums shall be paid immediately after the claims for wages. *They take their place in the order prescribed by Section* 64-*b* (7), *regardless of where Section* 130 *puts them.*" 61 Fed. (2) l. c. 767.

For the reasons given, I concluded that the State and various city taxes are all upon an equality, that, since they cannot be paid in full, the available fund should be prorated among the several claims according to their respective amounts, and I, therefore, entered the order of August 31, 1934, denying the motion of the State for priority.

To which order the State, by its attorneys, duly excepted, and asked certification for review.

The said order is accordingly certified to the Judge for his opinion thereon.

I hand up herewith, for the information of the Judge:

1. The motion of the State, filed April 10, 1934, to modify the order of the Referee respecting taxes due the State.

2. The claims of the State filed March 30, 1933, for the taxes in question, amounting to $8580.20.

3. The order of the Referee, dated June 9, 1933, allowing the above claim of the State.

[fol. 21] 4. Three separate proofs of debt, for the city gasoline taxes mentioned in the said motion of the State, all signed and sworn to by the License Collector of the City of St. Louis, and filed February 28, 1933.

5. The order of the Referee allowing the said city taxes, dated June 9, 1933.

6. The order of the Referee, dated August 31, 1934, denying the said motion of the State.

7. The petition of the State, filed September 1, 1934, for review of the order last above mentioned.

John A. Hope, Referee in Bankruptcy.

St. Louis, Missouri, September 21st, 1934.

IN UNITED STATES DISTRICT COURT

ORDER OVERRULING THE PETITION OF THE STATE OF MISSOURI FOR REVIEW OF THE ORDER OF THE REFEREE—Filed December 31, 1934

The petition of the State of Missouri for a review of the order of the Referee of August 31, 1934, denying petitioner's motion to direct the trustee to pay the State's claim for gasoline taxes in full before making any payment to the City of St. Louis having come on for hearing on November 30, 1934, was submitted to the Court; and now on this 31st day of December, 1934, after due consideration thereof the issues are found against petitioner.

It is therefore ordered that the aforesaid petition of the State of Missouri for review of the aforesaid order be and is hereby overruled and the said order of the referee is in all respects approved and confirmed.

Charles B. Davis, U. S. District Judge.

IN UNITED STATES DISTRICT COURT

PETITION OF STATE OF MISSOURI FOR APPEAL FILED IN U. S. DISTRICT COURT—Filed January 28, 1935

Now on this day comes the State of Missouri, Creditor, of the Laissig Oil Products, Inc., Bankrupt, and being ag-

grieved by the decree and order in this cause made and entered December 31, 1934, for the reasons set forth in the [fol. 22] Assignment of Errors filed herewith and herein prays that it be allowed an appeal from said decree and said order in this cause to the United States Circuit Court of Appeals for the Eighth Circuit, and that Citation be issued as provided by law and that a transcript of the record, pleadings, papers and proceedings upon which said decree and said order were based, duly authenticated, be filed with the United States Circuit Court of Appeals for the Eighth Circuit under the rule of such court in such cases made and provided.

Roy McKittrick, Attorney General; H. G. Waltner, Jr., J. A. Lennon, Assistant Attorneys General, for Petitioner.

In United States District Court

Assignment of Errors on Appeal Allowed by U. S. District Court—Filed January 28, 1935

Now on this day comes the State of Missouri, Appellant, and files this assignment of errors in the above entitled cause into and upon the order and decrees of the United States District Court for Eastern Division of the Eastern District of Missouri, in the above entitled cause, and further avers, alleges and states the fact to be that there is harmful and manifest error herein in the following particulars, to-wit:

I

That the Court erred in failing and refusing to grant appellant's motion to modify the order of Referee respecting taxes due the State of Missouri so as to allow appellant's claim for taxes as prior to the claim for taxes of the City of St. Louis.

II

The Court erred in neglecting, failing and refusing to order and direct the payment of appellant's taxes for gasoline as a prior preference, the same to be paid in full before any distribution is to be made to the City of St. Louis on its claim for gasoline taxes.

III

The Court erred in that the finding, judgment and decree of the court is against the law applicable to the case.

[fol. 23]

IV

The Court erred in failing to hold that the priorities as between the State of Missouri and City of St. Louis in the instant case are determined by Section 3152 R. S. Mo. 1929, and in failing to hold that such provision is consistent with and conformable to the Federal Bankruptcy Act.

V

The Court erred in failing to hold that Section 104, Title 11 U. S. C. A. does not establish parity of taxes or require allowance of all the taxes falling within such classification with an equal priority.

VI

The Court erred in failing to hold that the sovereign state of Missouri was entitled to payment of its taxes prior to the payment of the taxes of one of its [—] the City of St. Louis.

Wherefore, appellant prays the order and judgment of the Court reversing said judgment and decree.

Roy McKittrick, Attorney General; H. G. Waltner, Jr., Assistant Attorney General; J. A. Lennon, Assistant Attorney General, for appellant.

IN UNITED STATES DISTRICT COURT

ORDER OF U. S. DISTRICT COURT ALLOWING APPEAL—Filed January 28, 1935

This day came the appellant, by its solicitor, and presented to the Court its petition for the allowance of an appeal to the United States Circuit Court of Appeals for the Eighth Circuit, which petition, upon consideration by the Court, is hereby allowed and the Court allows an appeal to the United States Circuit Court of Appeals for the Eighth Circuit upon furnishing bond in the amount of

$250.00 Dollars to be approved by the Court within 10 days from the issuing of this order allowing appeal.

Dated this 28th day of January, 1935.

Charles B. Davis, Judge of United States District Court.

[fol. 24] IN UNITED STATES DISTRICT COURT

ELECTION AS TO PRINTING OF RECORD—Filed January 28, 1935

Comes now the State of Missouri, Appellant, and desires and elects that the record in this Appeal allowed by the United States District Court be printed under the supervision of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

Roy McKittrick, Attorney General; H. G. Waltner, Jr., Assistant Attorney General; J. A. Lennon, Assistant Attorney General, for Appellant. John T. Ross, Trustee in Bankruptcy for Laessig's Oil Products, Inc. City of St. Louis, by Chas. M. Hay, John G. Burkhardt.

IN UNITED STATES DISTRICT COURT

PRÆCIPE FOR TRANSCRIPT ON BEHALF OF APPELLANT, STATE OF MISSOURI—Filed January 28, 1935

To the Clerk of the United States District Court for the Eastern Division of the Eastern District of Missouri:

You are hereby requested to make a transcript of record to be filed in the United States Circuit Court of Appeals for the Eighth Circuit pursuant to the appeal allowed by the United States District Court in the above entitled cause, and to include in such transcript of record the following and no other papers or exhibits, to-wit:

(1) Original claim of the State of Missouri showing the filing thereof on March 30, 1933.

(2) Order of the Referee dated June 9, 1933, allowing such claim.

(3) Three separate proofs of debts of the City of St. Louis showing the filing thereof on February 28, 1933.

[fol. 25] (4) Order of the Referee dated June 9, 1933, allowing such claims.

(5) Motion to Modify Order of Referee, filed by State of Missouri, showing the filing thereof on April 10, 1934.

(6) Order of the Referee overruling the Motion to Modify Order of Referee filed by the State of Missouri dated August 31, 1934.

(7) Petition of State of Missouri for Review of Referee's Order overruling Motion to Modify, showing the filing thereof on September 1, 1934.

(8) Certificate of the Referee on Petition to the State of Missouri for review of the Order of the Referee Denying Petitioner's Motion to Direct the Trustee to Pay the State's Claim for Gasoline Taxes in Full Before Making any Payment to the City of St. Louis.

(9) Order of the District Court Overruling the Petition of the State of Missouri for Review of the Order of the Referee.

(10) Petition of State of Missouri for Appeal from Order of the District Court.

(11) Order allowing appeal of State of Missouri.

(12) Assignment of Errors by State of Missouri.

(13) Præcipe for Record.

(14) Proof of Service of Præcipe for record.

(15) Citation on Appeal.

(16) Proof of Service of Citation on Appeal.

(17) Election as to printing of Record.

Said transcript to be prepared as required by law and the rules of this Court and the rules of the United States Circuit Court of Appeals for the Eighth Circuit and to be filed in the office of the Clerk of the United States Circuit Court at St. Louis, Missouri, on or before the 9th day of March, 1935.

Dated this 28th day of January, 1935.

Roy McKittrick, Attorney General; H. G. Waltner, Jr., Assistant Attorney General; J. A. Lennon, Assistant Attorney General, for Appellant.

[fol. 26] Service of the above præcipe accepted and acknowledged this 28 day of January, 1935.

John T. Ross, Trustee Laissig's Oil Products, Inc.

Service of the above præcipe accepted and acknowledged this 28th day of January, 1935.

City of St. Louis, by Chas. M. Hay, John G. Burkhardt.

[fol. 27] Bond on appeal for $250, approved and filed February 5, 1935, omitted in printing.

IN UNITED STATES DISTRICT COURT

Narrative Statement of Proceedings—Filed March 8, 1935

Be It Remembered That in the above entitled cause the following proceedings were had in the above named court, being the United States District Court for the Eastern Division of the Eastern Judicial District of Missouri, and at the September term (1934) of said court.

On the 21st day of September, 1934, there was filed with the clerk of said court the certificate of the referee on petition of the State of Missouri for review of the order of the referee denying petitioner's motion to direct the trustee to pay the State's claim for gasoline taxes in full before making any payment to the City of St. Louis.

Said certificate being in words and figures as follows:

(Clerk will insert said certificate of the referee). The same is inserted elsewhere in the transcript herein.

Thereafter, on the 30th of November, 1934, the cause was submitted to the Court upon the certificate of the Referee.

Thereafter, on the 31st of December, 1934, the court, by order and decree duly filed and entered of record, overruled the motion of the State of Missouri for review and approved and affirmed the order of the referee in all respects.

To which ruling and order and decree of the Court overruling motion of Claimant (Appellant) then and there duly and legally objected and excepted and continues to object and except. Said order and decree overruling said motion is in words and figures as follows:

(The clerk will herein insert said order). The same is also inserted in the transcript herein.

Thereafter, on the 28th day of January, 1935, the Claimant (Appellant) duly filed with the Clerk of said Court its [fol. 28] petition for an appeal of said cause to the United States Circuit Court of Appeals, Eighth Circuit, from the court's order entered on the 31st day of December, 1934.

Said petition for appeal is in words and figures as follows:

(The Clerk will here insert such petition for appeal). The same is inserted elsewhere in the transcript herein.

And at the same time and with said Petition for Appeal of said cause Claimant (Appellant) filed its assignment of errors on such proposed appeal, which said assignment of errors is in words and figures as follows:

(The Clerk will here insert such transcript of errors). The same is inserted elsewhere in the transcript herein.

And said Petition for Appeal with said Assignment of Errors thereupon and on the 28 day of January, 1935, was duly presented to the court and thereupon and on said last named date, the Court, by order duly filed and entered, allowed said appeal as prayed upon Claimant (Appellant), giving bond in the sum of $250.00.

Said order allowing said appeal is in words and figures as follows:

(Clerk will here insert said order allowing said appeal). The same is inserted elsewhere in the transcript herein.

Thereafter and on the 28th day of January, 1935, there was issued and duly served upon the Attorneys (Counsel) for Appellees, Citation in said cause, which Citation together with Proof of Service thereof was, on the last named date, duly filed with the Clerk of said Court and entered of Record.

Said Citation, Proof of Service thereof and Order are in words and figures as follows:

(Clerk will here insert said Citation, Proof of Service thereof and Order, entering the same of record).

Thereafter and on the 5th day of February, 1935, the Claimant (Appellant) presented to the Court such bond on

appeal which then and there and on said last named date was approved by the Court and ordered filed on record which was accordingly done.

Said bond on appeal and said order approving and filing the same are in words and figures as follows:

[fol. 29] (Clerk will here insert said bond and said order). The same are inserted elsewhere in the transcript herein.

Thereafter and on the 28th day of January, 1935, Claimant's (Appellant's) Præcipe for Transcript bearing acknowledgment of service by counsel for Appellees was duly filed with the Clerk of said Court and ordered entered of Record.

Said Præcipe with acknowledgment of service thereof and said order are, in words and figures as follows:

(Clerk will here insert same). The same are inserted elsewhere in the transcript herein.

Thereafter and on the 28th day of January, 1935, there was duly filed with the Clerk of said Court Claimant's (Appellant's) election that the record be printed under the supervision of the Clerk of the Circuit Court of Appeals and ordered entered of record.

Said election and order are in words and figures as follows:

(Clerk will here insert same). The same are inserted elsewhere in the transcript herein.

The above were all the proceedings had in said Court in said cause.

(Approval of Narrative Statement of Proceedings by District Judge, etc.)

Therefore, the said State of Missouri, Appellant (Claimant) presents this, its Narrative Statement of Proceedings in said cause and prays the Court to allow, sign and seal the same so that the matters, rulings and exceptions may be made a part of the record herein which is accordingly done this 8th day of March, 1935.

Charles B. Davis, Judge of the District Court of the United States within and for the Eastern Division of the Eastern Judicial District of Missouri.

O. K. Chas. M. Hay, John G. Burkhardt, Attorneys for Appellees.

[fol. 30] Clerk's certificate to foregoing transcript omitted in printing.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

In Bankruptcy #6862

In re LAISSIGS OIL PRODUCTS, INC.

STATE OF MISSOURI, Creditor, Appellant,

vs.

JOHN T. ROSS, Trustee in Bankruptcy of Laissigs Oil Products Inc., and CITY OF ST. LOUIS, Creditor, Respondents

PETITION OF STATE OF MISSOURI FOR APPEAL—Filed January 29, 1935

[fol. 31] To the Honorable, the Judges of the Circuit Court of Appeals for the Eighth Circuit of the United States:

Your petitioner, State of Missouri, respectfully represents:

1. That petitioner is a creditor of Laissigs Oil Products, Inc., a Bankrupt, heretofore on February 1, 1933, adjudged bankrupt by the District Court of the United States for the Eastern Division of the Eastern District of Missouri.

2. That prior to such adjudication the bankrupt was duly incorporated and licensed by petitioner to engage in the business of dealing in and distributing motor vehicle fuels for use and sale and distribution for use on the highways of the State of Missouri.

3. That thereupon the Bankrupt became obligated to pay to the petitioner two cents per gallon upon all motor vehicle fuels received by it in this state, payment to be made by the 25th of the month following the month during which such motor vehicle fuels are received.

4. That after such adjudication your petitioner herein did on March 30, 1933, file with the designated referee its claim for preference in the sum of $8,580.20, the same constituting motor vehicle fuel taxes and interest to date of adjudication.

5. That thereafter on June 9, 1933, the referee entered his order allowing claim of petitioner and the claims of the City of St. Louis for gasoline taxes, the proof of debt for which had been theretofore filed, such claims being allowed by the referee as preferred claims of equal rank.

6. That thereafter on April 10, 1934, petitioner filed a motion to modify the order of the referee so as to give petitioner's claim a priority over the claim of the City of St. Louis for gasoline taxes.

7. That thereafter on August 31, 1934, the referee entered an order denying petitioner's motion and dismissing it.

8. That on September 1, 1934, petitioner filed petition for review of such order of the referee by the District Court for the Eastern Division of the Eastern District of Missouri.

9. That thereafter on the 31st day of December, 1934, an order was granted and entered by the said District Court of the United States overruling the petition of the State of Missouri for review and in all respects approving and confirming the order of the referee. A copy of said order of said District Court is hereto attached.

[fol. 32] 10. That the order of December 31, 1934, is erroneous in that as a matter of law the State of Missouri is entitled to priority over the City of St. Louis in distribution of the assets of the bankrupt estate for the following reasons:—

(a) Under the provisions of 11 U. S. C. A. 104, the taxes of the State of Missouri and of the City of St. Louis are classified as preferred claims. This section provides in part as follows:

"The Court shall order the trustee to pay all taxes legally due and owing by the bankrupt to the United States, State, county, district or municipality, in the order of priority as set forth in paragraph B hereof * * *

(b) to have priority in advance of the payments of dividends to creditors, and to be paid in full out of bankrupt estates, and the order of payment shall be * * * (6) taxes payable under paragraph (a) hereof * * *"

The foregoing provision does not determine the priority as between state and municipal taxes, nor does it require that such taxes be allowed and paid on a parity. Although the Courts have held taxes of the United States and of the State are on a parity, (because each sovereign must be recognized) the courts have not so held in respect to tax claims of a state and one of its municipalities.

(b) Under the established doctrine of sovereignty of the State, applying to debts due the sovereignty, taxes due the State must be paid before taxes due the City of St. Louis. Under this principle the sovereign state is enti-led to payment of its debt prior to the payment of debts of governmental agencies of lesser dignity. This sovereign right has never been relinquished or waived by the State of Missouri.

(c) Under the provisions of Section 3152 R. S. Mo. 1929, reading as follows:

"Whenever any person indebted to the state of Missouri is insolvent, or whenever the estate of any deceased debtor in the hands of the executors or administrators is insufficient to pay all the debts due from the deceased, the debts due to the State of Missouri shall be first satisfied, and the priority hereby established shall extend as well to cases in which a debtor not having sufficient property to pay all his debts makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed: Provided, that nothing in this article contained shall be construed to interfere with [fol. 33] the priority of the United States as secured by law, or the payment of the expenses of the last sickness, wages of servants, demands for medicine and medical attendance during the last sickness of the deceased, nor funeral expenses."

the State of Missouri is entitled to priority in payment of its debts over municipal corporations. The term debt used in this Section has be-n construed by the Supreme Court of

Missouri to include taxes. As this statutory provision is not contrary to or in conflict with the theory or provisions of the Federal Bankruptcy Act, it should be recognized by the Bankruptcy Court in the distribution of the assets of the estate.

Wherefore, your petitioner feeling aggrieved because of such order entered on December 31, 1934, in the above entitled proceeding, does hereby petition for an appeal from the said order to the United States Circuit Court of Appeals for the Eighth Circuit, and prays that its appeal may be allowed and that a citation may be granted and directed to John T. Ross, Trustee of the above named bankrupt estate and to the City of St. Louis, adversely interested, commanding them to appear before the United States Circuit Court of Appeals for the Eighth Circuit to do and receive that which may appertain to justice to be done in the premises, and that a transcript of the record and evidence in said proceeding, duly authenticated may be transmitted to the said United States Circuit Court of Appeals for the Eighth Circuit.

Roy McKittrick, Attorney General; H. G. Waltner, Jr., J. A. Lennon, Assistant Attorneys General, for Appellant.

STATE OF MISSOURI,
County of Cole, ss:

Now on this 22nd day of January, 1935, comes Harry G. Waltner, Jr., being first duly sworn upon his oath states that he is a duly appointed, qualified and acting Assistant Attorney General of the State of Missouri, and as such makes this affidavit.

That the matters and things contained in the foregoing petition of the State of Missouri for appeal are true and correct according to the best of his knowledge, information and belief.

[fol. 34] That this appeal is not intended for vexation or delay but that he verily believes that injustice has been done.

That attached to this petition is a true and correct copy of the order in the above entitled cause made by Honorable B. Davis, Judge of the United States District Court of the

Eastern Division of the Eastern District of Missouri, made, filed and entered on the 31st day of December, 1934.

H. G. Waltner, Jr., Assistant Attorney General.

Subscribed and sworn to before me this 2nd day of January, 1935. J. L. Ritzenthaler, Notary Public. My Commission expires January 21, 1937. (Notarial Seal.)

Order Overruling the Petition of the State of Missouri for Review of the Order of the Referee

UNITED STATES OF AMERICA,
Eastern Division of the Eastern
Judicial District of Missouri, ss:

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR SAID DIVISION OF SAID DISTRICT

In Bankruptcy. No. 6862

In the Matter of LAESSIG'S OIL PRODUCTS, INC., Bankrupt

The petition of the State of Missouri for a review of the order of the Referee of August 31, 1934, denying petitioner's motion to direct the trustee to pay the State's claim for gasoline taxes in full before making any payment to the City of St. Louis having come on for hearing on November 30, 1934, was submitted to the Court; and now on this 31st day of December, 1934, after due consideration thereof the issues are found against petitioner.

It is therefore ordered that the aforesaid petition of the State of Missouri for review of the aforesaid order be and is hereby overruled and the said order of the referee is in all respects approved and confirmed.

Charles B. Davis, U. S. District Judge.

[fol. 35] Endorsed: Filed, Dec. 31, 1934.

A copy. Attest: Jas. J. O'Connor. (Seal.)

[File endorsement omitted.]

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

[Title omitted]

ASSIGNMENT OF ERRORS—Filed January 29, 1935

Now on this day comes the State of Missouri, Appellant, and files this assignment of errors in the above entitled cause into and upon the order and decrees of the United States District Court for Eastern Division of the Eastern District of Missouri, in the above entitled cause, and further avers, alleges and states the fact to be that there is harmful and manifest error herein in the following particulars, to-wit:

I.

That the Court erred in failing and refusing to grant appellant's motion to modify the order of Referee respecting taxes due the State of Missouri so as to allow appellant's claim for taxes as prior to the claim for taxes of the City of St. Louis.

II

The Court erred in neglecting, failing and refusing to order and direct the payment of appellant's taxes for gasoline as a prior preference, the same to be paid in full before any distribution is to be made to the City of St. Louis on its claim for gasoline taxes.

[fol. 36]

III

The Court erred in that the finding, judgment and decree of the court is against the law applicable to the case.

IV

The Court erred in failing to hold that the priorities as between the State of Missouri and City of St. Louis in the instant case are determined by Section 3152 R. S. Mo. 1929, and in failing to hold that such provision is consistent with and conformable to the Federal Bankruptcy Act.

V

The Court erred in failing to hold that Section 104, Title 11 U. S. C. A. does not establish parity of taxes or require

allowance of all the taxes falling within such classification with an equal priority.

VI

The Court erred in failing to hold that the sovereign state of Missouri was entitled to payment of its taxes prior to the payment of the taxes of one of its municipalities, the City of St. Louis.

Wherefore, appellant prays the order and judgment of the Court reversing said judgment and decree.

Roy McKittrick, Attorney General; H. G. Waltner, Jr., Assistant Attorney General; J. A. Lennon, Assistant Attorney General, for Appellant.

[File endorsement omitted.]

UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT

[fol. 37] STATE OF MISSOURI, Creditor, Appellant,

vs.

JOHN T. ROSS, Trustee in Bankruptcy of Laessig's Oil Products, Inc., and CITY OF ST. LOUIS, Creditor, Appellee

ORDER ALLOWING APPEAL, ETC.—January 29, 1935

The appeal sought by the State of Missouri in the above entitled cause is hereby allowed upon condition that a cost and damage bond in the sum of Two Hundred Fifty ($250.00) Dollars, to be approved by the Clerk of this Court, be filed on or before ten days from this date.

Citation, in usual form, showing service on John T. Ross and others, omitted in printing.

[fols. 38-44] Bond on appeal for $250, approved and filed February 5, 1935, omitted in printing.

[fol. 45] UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT, NOVEMBER TERM, A. D. 1935

No. 10,239

STATE OF MISSOURI, Creditor, Appellant,

vs.

JOHN T. Ross, Trustee in Bankruptcy of Laessig's Oil Products, Inc., and CITY OF ST. LOUIS, Creditor, Appellees

Appeal from the District Court of the United States for the Eastern District of Missouri

NOVEMBER TERM, A. D. 1935

No. 10,281

STATE OF MISSOURI, Creditor, Appellant,

vs.

JOHN T. Ross, Trustee in Bankruptcy of Laessig's Oil Products, Inc., and CITY OF ST. LOUIS, Creditor, Appellees

Appeal from the District Court of the United States for the Eastern District of Missouri

OPINION—December 3, 1935

Mr. Harry G. Waltner, Jr., Assistant Attorney-General (Mr. Roy McKittrick, Attorney-General, was with him on the brief), for Appellant.

[fol. 46] Mr. John G. Burkhardt, Associate City Counselor (Mr. Charles M. Hay, City Counselor, was with him on the brief), for Appellees.

Before GARDNER, WOODROUGH and FARIS, Circuit Judges

GARDNER, Circuit Judge, delivered the opinion of the court.

This matter comes to us on appeal from an order of the lower court denying appellant's motion to direct the trustee in bankruptcy of the Laessig's Oil Products, Inc. to pay the claim of the State of Missouri for gasoline taxes in full before making any payment to the City of St. Louis for gasoline taxes.

Laessig's Oil Products, Inc. was, prior to bankruptcy, engaged in the business of distributing and selling motor vehicle fuels and other petroleum products in St. Louis, Missouri, and vicinity. Under the Missouri statute, motor vehicle fuel was subject to a sales tax calculated at the rate of two cents per gallon. During the months of August, September, October, November, and December, 1932, it failed to pay this tax, and during the same time it failed to pay a similar tax to the City of St. Louis, to which its products were subject under provisions of the city ordinance. On February 1, 1933, the Company was adjudged a bankrupt. On February 28, 1933, three separate proofs were filed on behalf of the City of St. Louis, claiming gasoline taxes in the aggregate amount of $8972.30 and interest; and on March 20, 1933, the State of Missouri filed its claim for gasoline taxes in the aggregate amount of $8366.38, with interest.

The State asserted a right of priority to the payment of its tax in full before making any payment to the City of St. Louis. The question of the right of priority becomes important because the value of the assets of the estate is materially less than the aggregate amount of these two claims. There is no dispute as to the amount due on these claims. The referee held that the claim of the State and of the City were all upon an equality, and since they could not be paid in full, the available funds should be prorated between the two claims according to their respective amounts. On petition for review of this order the court denied the same and approved and confirmed the order of the referee.

[fol. 47] Section 64 of the Bankruptcy Act (11 U. S. C. A. Sec. 104a) in so far as here pertinent, provides as follows:

"Debts which have priority. (a) The court shall order the trustee to pay all taxes legally due and owing by the bankrupt to the United States, state, county, district or municipality, in the order of priority as set forth in paragraph (b) hereof * * *.

"(b) The debts to have priority, in advance of the payment of dividends to creditors, and to be paid in full out of bankrupt estates, and the order of payment shall be (1) the actual and necessary cost of preserving the estate

* * *; (2) the filing fees paid by creditors in involuntary cases, etc. * * *; (3) the cost of administration, etc. * * *; (4) where the confirmation of composition terms has been refused or set aside upon the objection and through the efforts and at the expense of one or more creditors, in the discretion of the court, the reasonable expenses of such creditors, etc. * * *; (5) wages due to workmen, etc. * * *; (6) taxes payable under paragraph (a) hereof, and (7) debts owing to any person who by the laws of the states or the United States is entitled to priority * * *."

Appellant admits that the Federal Bankruptcy Law supersedes all state priority provisions which are in conflict with it, but contends that it is the policy of the Bankruptcy Act to recognize and adopt so far as possible relevant state laws, so long as the uniformity of the Bankruptcy Act would not be disturbed. Appellant invokes the provisions of Section 3152, Revised Statutes of Missouri, 1929, as being relevant and not in conflict with the provisions of the Bankruptcy Act. The section referred to provides as follows:

"Whenever any person indebted to the State of Missouri is insolvent, * * * debts due to the State of Missouri shall be first satisfied and the priority hereby established shall extend as well to cases in which a debtor not having sufficient property to pay all of his debts makes a voluntary assignment thereof, * * * as to cases in which an act of bankruptcy is committed: Provided, that nothing in this article contained shall be construed to interfere with the priority to the United States as secured by law * * *."

Because of the provisions of this Act, appellant contends its claim should have been allowed as a preference over [fol. 48] the City's claim. The asserted right of priority is not predicated upon any lien that attached to the property. As said by us in City of Lincoln v. Ricketts, 77 Fed. (2d) 425:

"The asserted right of priority of payment is not a lien that attached to the property any more than the right of the United States to priority given it by Revised Statutes,

Sec. 3466 (31 U. S. C. A. Sec. 191), considered by the Supreme Court in Davis v. Pringle, supra, is such a lien, and the right of priority in payment of claims against a bankrupt estate, other than those based upon specific liens, must be found in the Bankruptcy Act."

The Bankruptcy Act deals specifically with the question of priority of claims, and by paragraph 6 of Section 64 (b) provision is made for the payment of all taxes legally due and owing by the bankrupt to the United States, state, county, district, or municipality. It seems clear that the specific provision for the payment of taxes does not contemplate any right of priority as between the various taxing districts.

In New Jersey v. Anderson, 203 U. S. 483, the court, in reply to a contention that the Bankruptcy Act did not require the payment of taxes to a state wherein the bankrupt had no property and the state no means of collecting the tax upon the property within its jurisdiction, said:

"The requirement of the present law is a wide departure from the act of 1867, and specifically obliges the trustee to pay all taxes legally due and owing, *without distinction between the United States and the state, county, district, or municipality.*" (Italics supplied:)

See, also: Waco v. Bryan (C. C. A. 5) 127 Fed. 79; In re A. J. Waterman Mfg. Co. (D. C.) 291 Fed. 589; In re Wyley (D. C.) 292 Fed. 900; In re A. E. Fountain (D. C.) 295 Fed. 873.

It is, however, contended that the taxes due here amounted to debts, and, hence, under paragraph 7 of Sections 64 (b) the appellant was entitled to the benefit of the above quoted statute of Missouri. While taxes may be in the nature of debts within the meaning of the Bankruptcy Law, it is clear that they are specifically covered by paragraph 6. This seems so clear that rules of construction should not be resorted to, as it is only where a statute is [fol. 49] uncertain and on its face is susceptible of more than one construction that a court should resort to rules of construction. It seems too clear for argument that taxes legally due and owing by the bankrupt to the United States, state, county, district, or municipality, specifically men-

tioned in paragraph 6, are not included in the "debts" referred to in paragraph 7. If it could be said that there existed any repugnancy between these two provisions, then the provision which specifically characterizes the claim as one for taxes should prevail over the general provision contained in paragraph 7, referring to debts. The subject of taxes is fully and specifically covered by paragraph 6, and its provisions should be looked to alone, and there is no necessity to resort to the more general provision contained in paragraph 7.

The Circuit Court of Appeals of the Second Circuit, in In re Inland Dredging Corporation, 61 Fed. (2d) 765, considered the contention that a provision of the New York State Workmen's Compensation Act giving priority to certain debts should be given effect by the bankruptcy court. In disposing of this contention, the court said:

"We do not of course mean that a state statute may control the distribution of bankrupt estates. The priority arises under section 64b (7), which incorporates the state law pro tanto; and the hierarchy of claims—the order of their priority—is fixed by that section. Hence we ignore the provision of section 130 that premiums shall be paid immediately after claims for wages. They take their place in the order prescribed by section 64b (7), regardless of where section 130 puts them."

In Guarantee Title & Trust Company v. Title Guaranty & Surety Company, 224 U. S. 152, in speaking of the Bankruptcy Act, it is said that it "takes into consideration * * * the whole range of indebtedness of the bankrupt—national, state, and individual—and assigns the order of payment."

In Davis v. Pringle, 268 U. S. 315, the Federal agent contended that certain proved claims in bankruptcy proceedings were entitled to priority "on the ground that such claims arising during federal control of the railroads in 1918 are debts due to the United States and are preferred by Rev. Stats. Sec. 3466 and by the Bankruptcy Act of July 1, 1898 * * *." As the bankruptcy law then stood, debts [fol. 50] due the United States were not entitled to priority in payment, but it was contended that it was entitled to priority in payment under the provisions of Revised Statutes, Sec. 3466, above referred to. In denying this contention, the court, among other things, said: "It may be

assumed that the priority must be found if at all in the Bankruptcy Act and in its supposed incorporation of Rev. Stats. Sec. 3466," and the court held that "The priority claimed by the United States is not given to it by the law."

In City of Lincoln v. Ricketts, supra, we said:

"If, in the instant case, it be conceded that the city as a sovereign had the prerogative right of priority of payment of its claims, yet in so far as such claims are urged against a bankrupt estate, the priority will not be recognized unless within the provisions of the bankruptcy law which specifically provides for a priority."

We are of the view that resort can not be had to the Missouri statute for the purpose of determining the question of the right of priority, and that the Bankruptcy Act places all taxes, whether due the United States, state, county, district, or municipality, in one and the same class giving no priority to either over any other mentioned in the class.

The order appealed from is therefore
Affirmed.

[fol. 51] UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT

[Title omitted]

DECREE—December 3, 1935

These causes came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Missouri, and were argued by counsel.

On Consideration Whereof, It is now here ordered, adjudged, and decreed by this Court, that the order of the said District Court appealed from, in these causes, be, and the same is hereby, affirmed with costs; and that John T. Ross, Trustee in Bankruptcy of Laessig's Oil Products, Inc., and City of St. Louis, Creditor, have and recover against the State of Missouri, Creditor, the sum of Twenty [fol. 52] Dollars for their costs herein, to be collected in accordance with law.

December 3, 1935.

[fol. 53] UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

PETITION FOR REHEARING—Filed December 17, 1935

Now on this day comes the Petitioner, State of Missouri, Appellant in the above entitled causes, and within the time required by law, moves the Court to vacate and set aside the final judgment and decree heretofore entered on December 3, 1935, affirming the order of the District Court for [fol. 54] the Eastern District of Missouri in the above entitled causes, and to grant petitioner a rehearing in said causes because of material matters of the law and fact inadvertently overlooked by the Court in its opinion, in the respects herein pointed out.

(1) This Court in its opinion inadvertently failed to determine the issue raised under Point IV of Petitioner's brief. Although the state's claim is not clothed with a specific statutory lien yet there is an equitable or quasi lien attached to said claim which is allowable and should be recognized under Section 67 of the Bankruptcy Act, which Section preserves all existing liens on the property of the bankrupt. This point has apparently been overlooked by the Court in its decision, as on page four of the opinion it is stated "the asserted right of priority is not predicated upon any lien that attached to the property." Petitioner claimed and now claims a lien under Section 67 of the Bankruptcy Act. The opinion does not determine the rights of Petitioner under Section 67, which rights are superior to the rights of Appellee, City of St. Louis.

(2) The Court in its opinion has inadvertently overlooked the doctrine of sovereignty in its application to Section 64a and has construed such Section to have relinquished the right of sovereignty of the United States and that of the State of Missouri by mere construction, and that right, under well recognized rules of construction, cannot be denied or relinquished except through plain, unambiguous and certain language and can never be construed away.

(3) The Court in its opinion has inadvertently overlooked the decisions holding Section 3466, Revised Statutes United States to be in pari materia with the Bankruptcy

Act, and that accordingly Section 3152, Revised Statutes of Missouri must be so construed.

(4) That the decision in the instant case is in conflict with the decision of the United States Circuit Court of Appeals, Third Circuit, in the case of Commonwealth of Pennsylvania vs. Stocker, 70 Fed. (2d) 453, in which latter case the doctrine of sovereignty is recognized as being consistent with and to be applied in connection with gasoline tax claims in bankruptcy.

Wherefore, in view of the foregoing, the Petitioner respectfully prays this Court to grant a rehearing that right and justice may be done and a judgment rendered conformable to the facts and law in the instant case.

Roy McKittrick, Attorney-General; Harry G. Waltner, Jr., Assistant Attorney-General, for Petitioner State of Missouri.

[fol. 55] Certificate of Counsel

We, Roy McKittrick and Harry G. Waltner, Jr., hereby certify that we are counsel for Petitioner in the above entitled cause, that the facts set forth in the foregoing petition are true; that in our opinion said petition is well taken in point of law and is not interposed for vexation or delay, but is made in sincerity and good faith.

Roy McKittrick, Attorney-General; Harry G. Waltner, Jr., Assistant Attorney-General.

[File endorsement omitted.]

In United States Circuit Court of Appeals

Order Denying Petition for Rehearing—December 31, 1935

The petition for rehearing filed by counsel for appellant in these causes having been considered, It is now here ordered by this Court that the same, be, and it is hereby, denied.

December 31, 1935.

IN UNITED STATES CIRCUIT COURT OF APPEALS

MOTION FOR STAY OF MANDATE—Filed January 9, 1936

Comes now the Appellant above named, and respectfully moves this Honorable Court to stay the mandate in the above entitled action and not permit the same to be issued [fol. 56] out of said cause until further order of the Court on the ground and for the reason that Appellant expects and intends in good faith, within the time allowed by law, to apply to the Supreme Court of the United States of America by petition for a review on writ of certiorari the decision and judgment rendered in favor of Appellee and against Apellant in the above entitled actions.

Appellant further shows to the Court, if this Court so requires, that Appellant is ready, able and willing to make a good and sufficient bond, conditioned as provided by law, in said cause.

Wherefore, Appellant prays that the Court make and enter an appropriate order herein, staying the issuance of the mandate in the above entitled action until the further order of the Court, but not less than thirty days, and that the Court fix the amount of bond required of Appellant and that reasonable time be allowed in which to make, execute and file such bond.

Roy McKittrick, Attorney General; H. G. Waltner, Jr., Assi-tant Attorney General, for Appellant.

Service of motion omitted in printing.

[fol. 57] [File endorsement omitted.]

IN UNITED STATES CIRCUIT COURT OF APPEALS

ORDER STAYING ISSUANCE OF MANDATE—January 14th, 1936

On Consideration of the motion of appellant for a stay of the mandate in these causes pending a petition to the Supreme Court of the United States for a writ of certiorari, It is now here ordered by this Court that the issuance of the mandate herein be, and the same is hereby, stayed for a period of thirty days from and after this date, and if within said period of thirty days there is filed with the

Clerk of this Court a certificate of the Clerk of the Supreme Court of the United States that a petition for writ of certiorari, record and brief have been filed, the stay hereby granted shall continue until the final disposition of the cases by the Supreme Court.

January 14th, 1936.

[fol. 58] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 59] UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

ORDER FURTHER STAYING ISSUANCE OF MANDATE

On Consideration of the motion of appellant for a further stay of the mandate in these causes pending a petition to the Supreme Court of the United States for a writ of certiorari, It is now here ordered by this Court that the issuance of the mandate herein be, and the same is hereby, stayed for a period of 30 days from and after this date, and if within said period of 30 days there is filed with the Clerk of this Court a certificate of the Clerk of the Supreme Court of the United States that a petition for writ of certiorari, record and brief have been filed, the stay hereby granted shall continue until the final disposition of the cases by the Supreme Court.

February 12, 1936.

A true copy. Attest:

E. E. Koch, Clerk, U. S. Circuit Court of Appeals, Eighth Circuit. (Seal United States Circuit Court of Appeals, Eighth Circuit.)

[fol. 60] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed March 30, 1936

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit is

granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[Endorsed on cover:] File No. 40,336. U. S. Circuit Court of Appeals, Eighth Circuit. Term No. 782. State of Missouri, Creditor, petitioner, vs. John T. Ross, Trustee, et al. Petition for a writ of certiorari and exhibit thereto. Filed March 2, 1936. Term No. 3, O. T., 1936.